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In the Supreme Court of the United States

CORNELIUS P. YOUNG AND SUZANNE P. YOUNG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Whether the three-year time limit for establishing the priority and nondischargeability of income taxes under the Bankruptcy Code, 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A), is tolled during the time an automatic stay in the debtors' prior bankruptcy proceeding precluded the government from collecting those taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 233 F.3d 56. The opinion of the district court (Pet. App. 12a-13a) is unofficially reported at 2000-2 U.S. Tax Cas. (CCH) ¶ 50,522. The opinion of the bankruptcy court (Pet. App. 14a-22a) is unofficially reported at 99-1 U.S. Tax Cas. (CCH) ¶ 50,553.

JURISDICTION

The court of appeals entered its judgment on December 1, 2000. The petition for a writ of certiorari was filed on March 1, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. 105(a) provides, in relevant part:

The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. * * *

2. 11 U.S.C. 108(c) provides:

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, * * * and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

3. 11 U.S.C. 362(a) provides, in relevant part:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities, of—

* * * * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

* * * * *

4. 11 U.S.C. 507(a) provides, in relevant part:

The following expenses and claims have priority in the following order:

* * * * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

* * * * *

5. 11 U.S.C. 523(a) provides, in relevant part:

(a) A discharge under section 727 * * * of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed.

* * * * *

6. 11 U.S.C. 727(b) provides, in relevant part:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter * * *.

7. 26 U.S.C. 6503 (1994 & Supp. V 1999) provides in relevant part:

(b) **Assets of taxpayer in control or custody of court**

The period of limitations on collection [of taxes] after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

* * * * *

(h) **Cases under title 11 of the United States Code**

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection [of taxes] shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

* * * * *

STATEMENT

1. Under the Bankruptcy Code, income tax claims held by federal, state, and local governments enjoy priority for payment in bankruptcy proceedings if the tax returns from which those claims arise were due within three years of the filing of the bankruptcy petition. 11 U.S.C. 507(a)(8). Those same taxes are also protected from discharge. 11 U.S.C. 523(a)(1)(A). That means that, if the tax claim is not satisfied during the bankruptcy proceeding, the claim passes through the case and the government may seek to collect the taxes from the debtor after the automatic stay in the bankruptcy proceeding has been terminated. That three-year time limit is popularly known as the "three-year lookback period."

The Bankruptcy Code offers individual debtors two primary avenues of debt relief. First, individual debtors may seek a discharge of their debts under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* Under that Chapter, a debtor liquidates his non-exempt

assets, which are then distributed to creditors pursuant to a schedule of priorities. See 4 *Collier on Bankruptcy* ¶ 700.01 (Lawrence P. King ed., 15th ed. 2001). Income taxes arising from returns due within the three years preceding the petition enjoy an eighth priority for distribution in such proceedings and are not subject to discharge. 11 U.S.C. 507(a)(8), 523(a)(1)(A). Because a debtor immediately relinquishes his assets to a trustee for distribution to his creditors, a Chapter 7 proceeding generally proceeds expeditiously to discharge, unless a creditor objects. See Fed. R. Bankr. P. 2003(a), 4004.

In the alternative, a debtor may attempt to repay his debts by filing for reorganization under Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301 *et seq.* Chapter 13 "provides a reorganization remedy for consumer debtors and proprietors with relatively small debts." *Johnson* v. *Home State Bank*, 501 U.S. 78, 82 (1991). Individuals proceeding under Chapter 13 must adopt a repayment plan for their debts. That plan must, among other things, ensure the full payment of priority tax claims, which includes income taxes arising from returns due within the three years preceding the filing of the Chapter 13 petition, 11 U.S.C. 507(a)(8). See 11 U.S.C. 1322(a)(2). Debtors are obligated to begin making monthly payments to a Chapter 13 trustee soon after the bankruptcy petition is filed, but none of that money is actually distributed to creditors until the plan is finally confirmed. 11 U.S.C. 1326. After completion of the repayment plan, a debtor obtains a discharge of any remaining unpaid debts provided for by the plan. 11 U.S.C. 1328(a).[1]

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[1] While individuals, as well as businesses, can pursue reorganization under Chapter 11, *Toibb* v. *Radloff*, 501 U.S. 157, 160-166 (1991), most individuals prefer Chapter 13's simplified procedures.

Whether the debtor proceeds under Chapter 7 or 13, the filing of a bankruptcy petition triggers an "automatic stay" under 11 U.S.C. 362(a). The automatic stay prevents, among other things, the government from administratively or judicially collecting a debtor's prepetition tax liabilities or filing a notice of federal tax lien. 11 U.S.C. 362(a)(4) and (6). The automatic stay continues in effect until the property sought by the creditor is no longer property of the estate, the case is closed or dismissed, or the debtor is granted a discharge. 11 U.S.C. 362(c). As a general rule, the automatic stay remains in effect much longer in a Chapter 13 bankruptcy case than it does in a Chapter 7 proceeding. That is because a debtor proceeding under Chapter 7 usually receives a discharge shortly after relinquishing control of his prepetition assets to the trustee. The stay in a Chapter 13 case remains in effect until the repayment plan is completed (and the debtor is thereby discharged), which generally occurs three to five years after the petition is filed. 11 U.S.C. 1322(d), 1328(a).

Because the automatic stay interrupts the ability of all creditors, including the federal government, to pursue actions against the debtor, Section 108 of the Bankruptcy Code, 11 U.S.C. 108, tolls those nonbankruptcy limitations periods until the later of either (1) the end of the nonbankruptcy limitations period, including any suspensions of the period provided by nonbankruptcy law, or (2) thirty days after the bankruptcy stay is ended. 11 U.S.C. 108(c). The Internal Revenue Code likewise suspends the running of its own three-year limitation period on tax assessments (26 U.S.C. 6501(a) (1994 & Supp. V 1999)) and ten-year time limit on collections (26 U.S.C. 6502(a)(1) (Supp. V 1999)) for the time "during which the Secretary is

prohibited by reason of such case from making the assessment or from collecting." 26 U.S.C. 6503(h).

2. a. Petitioners received from the IRS an extension of time in which to file their 1992 federal income tax return until October 15, 1993, and they filed their return within that extended period. Despite earning more than $160,000 in 1992, however, petitioners paid only about $13,000 of their acknowledged $28,578 tax liability. Pet. App. 15a-16a; J.A. 5-6. The United States was able to collect only a portion of the remaining past-due taxes before May 1, 1996. On that date, petitioners filed a Chapter 13 bankruptcy petition. Pet. App 2a. That filing triggered the Bankruptcy Code's automatic stay, which barred the government from taking any further measures to collect the remaining unpaid taxes. 11 U.S.C. 362(a)(6).

Because petitioners' Chapter 13 bankruptcy case was filed less than three years after October 15, 1993—when their tax return for the 1992 tax year was due—petitioners were required to submit a Chapter 13 plan that provided for full payment of the government's claim. Pet. App. 15a. Although petitioners submitted such a plan, they failed to seek or obtain confirmation of that plan. *Id.* at 16a. Instead, on October 23, 1996—eight days after the three-year lookback period of Section 507(a)(8) expired—petitioners filed a notice of dismissal of their Chapter 13 bankruptcy case. See *id.* at 2a.[2] In February 1997, the trustee filed his final report, which was approved by the bankruptcy court, and the Chapter 13 case was closed on March 13, 1997. Pet. App. 16a. When, as here, dismissal occurs before a

[2] Chapter 13 allows debtors to request that the bankruptcy court dismiss their cases voluntarily at any time. 11 U.S.C. 1307(b).

Chapter 13 repayment plan is confirmed, any payments that were made by the debtors to the Chapter 13 trustee are returned to the debtors. 11 U.S.C. 1326(a)(2). As a result, the United States received no payments on its claim from the aborted Chapter 13 proceeding.

The day before the bankruptcy court entered its order closing petitioners' Chapter 13 case, petitioners filed a second petition for relief in bankruptcy. Pet. App. 2a-3a, 16a. That petition sought discharge of all eligible debts under Chapter 7. The bankruptcy court granted that discharge on June 17, 1997. *Id.* at 3a.[3]

b. Following the completion of the Chapter 7 case and the termination of the automatic stay, the government sought to collect the outstanding taxes owed by petitioners. Pet. App. 3a. In response, petitioners sought a determination from the bankruptcy court that their 1992 taxes, which were scheduled for full payment in the Chapter 13 case, were discharged in the Chapter 7 case. *Ibid.* Petitioners asserted that the taxes were discharged in that second bankruptcy case because, by the time that case was commenced, more than three years had elapsed since the due date of their 1992 tax return. Because, in petitioners' view, the three-year lookback period had elapsed, the 1992 taxes were not "priority" taxes under 11 U.S.C. 507(a)(8) and, consequently, were not excepted from discharge under 11 U.S.C. 523(a)(1)(A).

[3] Because petitioners had no assets available to satisfy their creditors, their bankruptcy proceeding was characterized as a "no-asset" Chapter 7 case. Pet. App. 3a. According to the IRS, during fiscal year 2000, the IRS was listed as a creditor or potential creditor in more than 315,000 Chapter 7 bankruptcy cases. Nearly 290,000 of those were no-asset cases.

The bankruptcy court rejected petitioners' contention. Pet. App. 14a-22a. The court "follow[ed] the well reasoned decisions in this circuit, as well as others" (*id.* at 19a), that the three-year lookback period was tolled during the period in which the automatic stay in the Chapter 13 bankruptcy case precluded the government from enforcing its claim. The court explained (*id.* at 19a-20a) that the three-year lookback period of Section 507(a)(8) operates as a statute of limitations and, as such, is tolled by the provisions of the Bankruptcy Code and Internal Revenue Code that toll the statutes of limitations for collection of tax claims when the automatic stay is in effect. *Id.* at 19a (citing 11 U.S.C. 108(c) and 26 U.S.C. 6503(b)). The court further emphasized that any other conclusion would result in "an absurd consequence unintended by Congress and would allow debtors to manipulate the bankruptcy system." Pet. App. 20a. The court explained that,

> [a]lthough the Court imputes no bad faith on the Plaintiffs, it is worth noting that the Defendant's claim was to be paid in full under the Plaintiff's Chapter 13 plan. Were the Court to allow this debt to be discharged, debtors could easily propose a plan to pay the Internal Revenue Service's claim in full under Chapter 13, dismiss their Chapter 13 case and file Chapter 7 to discharge the tax debt.

Ibid. "Such an easy loophole," the court concluded, "cannot be allowed," *ibid.*, because it "would circumvent wholly the IRS's three-year time period in which to collect taxes," *id.* at 21a.

The district court sustained the bankruptcy court's ruling. Pet. App. 12a-13a.

3. The court of appeals affirmed. Pet. App. 1a-10a. Deeming the three-year lookback period as "akin to a statute of limitations" (*id.* at 8a), the court of appeals concluded that, even in the absence of an express statutory tolling provision, courts may adopt a tolling rule "to assure that the underlying aims of Congress are not frustrated by conduct that thwarts" the plain purpose of the statute. *Id.* at 8a. The court noted that "[v]irtually all of the circuit cases dealing with successive bankruptcy petitions and the three-year lookback provision have chosen to" apply some type of tolling rule. *Ibid.* The court chose to "follow the majority view in favor of automatic tolling," because that rule avoids "taxpayer manipulation" of the bankruptcy process and preserves the "full three years" that Congress gave the government "to assess and collect taxes." *Id.* at 6a, 9a.

SUMMARY OF ARGUMENT

The court of appeals properly tolled the three-year lookback period for the collection of taxes in bankruptcy proceedings. The structure of the Bankruptcy Code and parallel provisions in the Internal Revenue Code manifest Congress's intent that the automatic stay in bankruptcy cases not deprive the government of an adequate time in which to seek recovery from delinquent taxpayers. The legislative history and the evolution of the relevant statutory provisions reconfirm Congress's understanding of the statutes' operation. The petitioners' proposed construction, by contrast, lacks any rational policy justification and would introduce unworkable anomalies into the operation of the Bankruptcy Code. It is inconceivable that Congress intended to legislate a scheme under which procedural legerdemain, rather than the recency of a tax obligation or the government's opportunity to pursue recovery, would dictate the defeasibility of an individual's duty to pay his fair share of taxes.

Tolling is consistent not just with the structure, purpose, and history of the controlling statutory provisions, but also with traditional principles of equitable tolling. Bankruptcy courts have their roots in equitable practice, and Congress has specifically preserved the bankruptcy courts' authority to issue equitable orders necessary to enforce the Bankruptcy Code's provisions. Equitable tolling of the three-year lookback period is appropriate because the government is legally barred from enforcing its claim during the prior bankruptcy proceeding and thus will be denied the time Congress provided for enforcement in the bankruptcy context. The public interest also weighs heavily in favor of tolling because it will prevent individuals' ready circumvention of their tax obligations and the attendant shifting of their tax burden to other taxpayers.

ARGUMENT

THE STRUCTURE, LEGISLATIVE HISTORY, AND PURPOSE OF THE BANKRUPTCY CODE AND ITS INTERNAL REVENUE CODE COMPLEMENT, ALONG WITH TRADITIONAL EQUITABLE PRINCIPLES, REQUIRE TOLLING OF THE THREE-YEAR LOOKBACK PERIOD

Through the various Bankruptcy and Internal Revenue Code provisions governing the enforcement of tax claims in bankruptcy proceedings, Congress struck a delicate balance between the debtor's obligation to pay his fair share of taxes, the debtor's need for a fresh start unsaddled by stale claims, the claims of competing creditors, and the government's need for a fair and adequate amount of time in which to prosecute unpaid tax claims. Petitioners, and countless debtors like them, have sought to unsettle that balance and escape payment of their taxes altogether through the mecha-

nism of serial bankruptcy filings. Debtors double-team the automatic stay and the prolonged proceedings under Chapter 13 to run down the government's three-year window for enforcing tax claims, then dismiss their cases and refile under Chapter 7, whereupon the debtors argue that the government's tax claims have been properly aged for discharge under the aegis of the automatic stay entered in the earlier bankruptcy proceeding(s). Attempts to use this tax-avoidance scheme have been widespread, in the experience of the IRS and as evidenced by the scores of published cases on the issue.[4]

Petitioners are unable to support their position by reference to congressional intent or the statutory purpose. Their only reference to congressional purpose focuses exclusively on the debtor's interest in a fresh start and the general interests of other creditors; petitioners overlook entirely the great weight Congress placed on ensuring the government a three-year period in which to collect tax claims. Nor do petitioners attempt to justify their vision of bankruptcy law as sensible policy. It has no sound basis. They simply

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[4] In an appendix to this brief, we provide a non-exhaustive list of some of the cases, beyond the court of appeals decisions discussed in this brief, in which the IRS has had to litigate this issue. According to the Internal Revenue Service, it participates as a creditor or potential creditor in more than 500,000 bankruptcy cases annually. In fiscal year 2000, the IRS submitted approximately 100,000 proofs of claim as a creditor in proceedings under Chapters 7, 11, and 13. The total value of those claims is estimated by the IRS to be $6 billion—$1.5 billion of which arises from Chapter 13 cases. While the IRS does not keep statistics tracking the use of this particular scheme, it advises that approximately 150 cases are currently pending that involve the use by taxpayers of serial bankruptcy filings to obtain a discharge of taxes without allowing the IRS three full years in which to collect those taxes

insist that courts are bound rotely to apply the textual provisions on which they rely. As every court of appeals that has addressed the issue has held, however, the statute does not leave courts so disabled.[5] Congress legislated against a backdrop of established statutory and equitable tolling principles that prevent expiration of the three-year lookback period under these circumstances.

[5] See *In re Palmer*, 219 F.3d 580 (6th Cir. 2000) (case-by-case equitable tolling); *In re Morgan*, 182 F.3d 775 (11th Cir. 1999) (per curiam) (presumptive equitable tolling); *In re Waugh*, 109 F.3d 489 (8th Cir.) (automatic tolling based on statutory structure), cert. denied, 522 U.S. 823 (1997); *In re Taylor*, 81 F.3d 20 (3d Cir. 1996) (automatic tolling based on statutory structure); *In re Quenzer*, 19 F.3d 163 (5th Cir. 1993) (case-by-case equitable tolling may be available); *In re West*, 5 F.3d 423 (9th Cir. 1993) (automatic tolling based on statutory structure), cert. denied, 511 U.S. 1081 (1994); *In re Richards*, 994 F.2d 763 (10th Cir. 1993) (automatic equitable tolling); *In re Montoya*, 965 F.2d 554 (7th Cir. 1992) (automatic tolling based on statutory structure). A leading treatise writer agrees that tolling is appropriate. 4 *Collier on Bankruptcy* ¶ 507.10[2][a], at 507-62 (Lawrence P. King ed., 15th ed. 2001) ("If, however, the debtor has been the subject of a bankruptcy case or cases during the three-year period, the three-year time period should be extended for the length of time that the automatic stay was in effect during the prior case or cases."); see also *ibid.* ("The reason for extending the reach-back period is to prevent a debtor from manipulating the bankruptcy process to escape tax liabilities. Without some kind of tolling of the relevant reach-back periods during the pendency of a case, a debtor would be able to escape liability for tax obligations by filing and dismissing multiple cases.").

A. The Structure, History, And Purpose Of The Relevant Statutory Provisions Manifest Congress's Intent That The Lookback Period Be Tolled While The Automatic Stay Is In Effect

1. The Structure and History of the Legislation.

As this Court has long recognized, there is a "broad public interest in maintaining a sound tax system," *United States* v. *Lee*, 455 U.S. 252, 260 (1982), and the collection of taxes is a compelling governmental interest, see *Hernandez* v. *Commissioner*, 490 U.S. 680, 699-700 (1989). Recognizing the important public interests at stake, Congress has taken measures to ensure that the government's assessment and collection efforts will not be impeded by bankruptcy proceedings

a. The 1966 compromise.

The assessment and collection of taxes has long been the object of special protections within bankruptcy proceedings. The rationale for such preferential treatment is that the taxing authority, whether state or federal, "is an involuntary creditor of the debtor" in that it "cannot choose its debtors, nor can it take security in advance of the time that taxes become due." H.R. Rep. No. 595, 95th Cong., 1st Sess. 190 (1977). In addition, "it takes a taxing authority time to locate and pursue delinquent tax debtors." *Ibid.* As a result, until 1966, unsecured tax claims were given priority over the claims of other unsecured creditors without regard to when the tax claims accrued. See 11 U.S.C. 35(a), 104(a)(4) (1964); H.R. Rep. No. 687, 89th Cong., 1st Sess. 2 (1965); S. Rep. No. 1158, 89th Cong., 2d Sess. 2 (1966). Tax debts were also not subject to discharge in bankruptcy regardless of their age. S. Rep. No. 1158, *supra*, at 2.

In the mid-1960s, Congress became concerned that tax claims were allowed to "accumulate and remain unpaid for long periods of time." S. Rep. No. 1158, *supra*, at 4. As a result, the debtor's "fresh start" was often burdened by "what may be an overwhelming liability for accumulated taxes." *Id.* at 2. In addition, Congress noted that the existing treatment of taxes saddled private creditors with the economic fallout from the bankruptcy. In Congress's view, it was only fair that "the Government as a creditor should bear part of the economic burden of business failures through the loss of some of its tax claims which it has allowed to accumulate over a long period of years." *Id.* at 4.

Accordingly, in 1966, Congress decided that it was appropriate to impose "some time limit upon the extent of taxes excepted from discharge," as well as on the time period for which tax claims retain priority over the claims of other creditors. S. Rep. No. 1158, *supra*, at 2, 4. That time limit—the three-year lookback period—provides that income taxes shall have priority for payment and retain their nondischargeable status only if the tax returns were due within "three years before the date of the filing of the petition." See Act of July 5, 1966, Pub. L. No. 89-496, 80 Stat. 270-271; see also 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A). Unless they qualify for special treatment under some other Bankruptcy Code provision (see, *e.g.*, 11 U.S.C. 523(a)(1)(B) and (C)), tax claims falling outside the three-year window are to be paid pro rata alongside the general unsecured claims of other creditors and are fully dischargeable at the close of the case. S. Rep. No. 1158, *supra*, at 1.

Congress anticipated that the balance it struck would "adequately safeguard[] the public's interest in the collection of revenues while at the same time limiting the impact of long accumulated, unsecured tax claims

on general creditors." H.R. Rep. No. 687, *supra*, at 4. In addition, Congress believed that "[t]he imposition of such a limitation" would spur "taxing authorities to act to prevent large accumulations of tax claims." *Ibid.*

Congress stressed, however, that the purpose of the legislation was not to "create a tax evasion device" or unduly impair the effectiveness of the government's tax collection efforts. S. Rep. No. 1158, *supra*, at 3-4. In fact, Congress believed that, by borrowing the three-year lookback period from the Internal Revenue Code's three-year statute of limitations on tax assessments, it would "discourage recourse to bankruptcy as a facile device for evading tax obligations." H.R. Rep. No. 687, *supra*, at 3.

b. The 1978 Bankruptcy Reform Act.

During enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, Congress revisited and reaffirmed the choice of the three-year priority and nondischargeability window accorded tax claims in the 1966 compromise legislation. The three-year lookback period, in Congress's view, fairly balanced the competing interests of

> (1) general creditors, who should not have the funds available for payment of debts exhausted by an excessive accumulation of taxes for past years; (2) the debtor, whose "fresh start" should likewise not be burdened with such an accumulation; and (3) the tax collector, who should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting.

S. Rep. No. 1106, 95th Cong., 2d Sess. 5 (1978); see also S. Rep. No. 989, 95th Cong., 2d Sess. 13-15 (1978); Staff of Jt. Comm. on Taxation, 95th Cong., 2d Sess., *Tax*

Aspects of S. 2266 (Bankruptcy Reform Act of 1978) 2-3 (Comm. Print 1978).

Congress understood that the three-year lookback period "gives the taxing authority three years to pursue delinquent debtors and obtain secured status," and, "[i]f a debtor files bankruptcy before that three-year period has run, the taxing authority is given a priority [in bankruptcy] in order to compensate for its temporarily disadvantaged position." H.R. Rep. No. 595, *supra*, at 190. That compromise fairly protected the interests of the taxpaying public at large, Congress concluded, because otherwise, "[t]o the extent that debtors in bankruptcy are freed from paying their tax liabilities, the burden of making up the lost revenues must be shifted to other taxpayers." S. Rep. No. 1106, *supra*, at 5. Congress thus reaffirmed its intent to avoid creating "[a]n open-ended dischargeability policy [that] would provide an opportunity for tax evasion through bankruptcy, by permitting discharge of tax debts before a taxing authority has an opportunity to collect any taxes due." H.R. Rep. No. 595, *supra*, at 190.

To ensure that the delicate balance it struck between taxing authorities and taxpayers/debtors would be preserved, Congress added Section 108(c) to the Bankruptcy Code in 1978. See 92 Stat. 2556-2557. Section 108(c) tolls the limitations period for a nonbankruptcy cause of action that has not yet run at the time the debtor's petition is filed. 11 U.S.C. 108(c). Congress crafted Section 108(c) "to minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings" and to "protect the right of governmental units (and other creditors) to collect debts which are not discharged in the bankruptcy proceeding" S. Rep. No. 989, *supra*, at

14-15. Section 108's purpose was to ensure that the time limitations on collecting a taxpayer's obligations would be suspended during the period in which an automatic stay in bankruptcy proceedings precluded enforcement of the government's claim, so that the taxing authority would have "adequate time to collect nondischargeable taxes following the end of the title 11 proceedings." *Id.* at 30-31. In fact, Congress stressed that "[t]he priority should apply if assessment or collection is stayed" because "the taxing authority has not had an adequate opportunity to assess or collect the taxes." H.R. Rep. No. 595, *supra*, at 191

c. The 1980 Tax Code Amendment.

Two years after the Bankruptcy Code was enacted, Congress inserted a counterpart to the bankruptcy tolling provision (11 U.S.C. 108(c)) into the Internal Revenue Code. See Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(a), 94 Stat. 3389. Section 6503(h) tolls the Internal Revenue Code's time limits on the assessment and collection of taxes during the period that a debtor is under the protection of the bankruptcy court. 26 U.S.C. 6503(h). That amendment was deemed necessary to ensure that,

> [if] the Internal Revenue Service is prohibited for a period of time by reason of a bankruptcy case from assessment or collection of tax (for example, because of the automatic stay under new 11 U.S. Code sec. 362(a)(6)), the running of the period of limitations is suspended for assessment, for the prohibition period and for 60 days thereafter; and for collection, for the prohibition period and for six months thereafter.

S. Rep. No. 1035, 96th Cong., 2d Sess. 50-51 (1980).

Thus, taken as a whole, (i) the Chapter 13 requirement that debtors fully pay tax claims falling within the three-year lookback period (11 U.S.C. 1322(a)(2)), (ii) the Chapter 7 rules (11 U.S.C. 726(a)(1), 727(b)) requiring that those same tax claims be accorded priority for payment and be immune from discharge (and thus fully collectible post-bankruptcy), and (iii) the complementary tolling provisions in 11 U.S.C. 108(c) and 26 U.S.C. 6503(h), textually embody Congress's intent that income tax claims falling within the three-year lookback period either be satisfied within or preserved through the bankruptcy case. Indeed, it was only on those terms that Congress decided, in the 1966 legislative compromise, to forgo the priority and nondischargeability previously accorded to all tax claims regardless of age.

Congress, moreover, took steps to restrict the opportunities for serial bankruptcy filings and to ensure that they would not disrupt the three-year lookback period. Chapter 7 discharges must be separated by six years, which is twice the length of the lookback period. 11 U.S.C. 727(a)(8). A Chapter 7 discharge may not follow a Chapter 13 discharge by less than six years, unless the debtor in the Chapter 13 proceeding paid all of his unsecured claims or paid 70% of them and the plan represented his "best effort" to pay those creditors. 11 U.S.C. 727(a)(9). See also 11 U.S.C. 727(a)(8) (Chapter 11 and Chapter 7 discharges must be separated by six years). Thus, in Congress's view, the Bankruptcy Code that it enacted adequately secured implementation of its intent that non-stale tax claims be paid.

2. The Bankruptcy Code Reflects Congress's Intent that the Three-Year Lookback Period Be Tolled.

a. Courts must consider statutory structure and purpose.

Despite Congress's concerted legislative efforts, by the mid-1980s, debtors had devised a means of skirting Congress's requirement that tax claims falling within the lookback period be paid, through the serial filing and dismissal before discharge of Chapter 13 and Chapter 7 bankruptcies. Most frequently, debtors would file a Chapter 13 petition, which would trigger the automatic stay and halt the government's tax collection efforts. The lengthy proceedings under Chapter 13 would allow the debtor to exhaust the government's three-year lookback period and then dismiss the Chapter 13 case before discharge. In cases where dismissal took place before a plan was confirmed, as occurred here, money paid to the trustee to satisfy the tax claim generally would be returned to the debtor. In addition, because the debtor's dismissal would predate the entry of a discharge in the Chapter 13 proceeding, the statutory requirement that the debtor wait six years before proceeding under Chapter 7 would be circumvented, and the debtor could file a Chapter 7 petition claiming a full discharge of the allegedly now-stale tax claims.[6]

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[6] Petitioners' assertion (Br. 28) that debtors "find it difficult to * * * tread water" in Chapter 13 proceedings for three years is belied by the facts of this case, their earlier acknowledgment (Br. 22) that "reorganization cases can last years," and the abundance of Bankruptcy Court and court of appeals cases dealing with precisely such circumstances. See note 4, *supra*; App., *infra*, 1a-4a. See also, *e.g.*, *In re Hoppe*, 259 B.R. 852, 856 (Bankr. E.D. Tex. 2001) ("[P]ublic policy concerns and simple notions of fairness suggest that the Bankruptcy Code was not promulgated as a

Relying primarily on the fact that none of the relevant statutory provisions explicitly require tolling of the lookback period, petitioners argue that the Bankruptcy Code mandates a full discharge and the "shift[ing] to other taxpayers" (*Tax Aspects of S. 2266* at 2) of their unpaid tax claims. It is clear, however, that all of the relevant statutory provisions contemplate that such tolling will occur, either by providing for analogous tolling explicitly or by according special

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means to thwart creditors, such as the IRS, by the filing of successive petitions and was not designed to allow debtors to create a scheme of bypassing the [C]ode's non-dischargeability provisions by filing a petition, letting the priority period expire, dismiss their case, and refile again (in order to discharge the taxes), thereby making themselves unreachable by the IRS.") (internal quotation marks omitted); *In re Bair*, 240 B.R. 247, 253 (Bankr. W.D. Tex. 1999) ("If the Debtors had not filed a second bankruptcy 193 days after dismissal of the Chapter 13 case, the IRS would have been able to collect the taxes due within the limitations periods and without having to confront the dischargeability issue. This Court will not allow the Bankruptcy Code to be utilized as an implement to evade creditors simply by the timing of successive bankruptcy filings.") (citations omitted); *In re Hollowell*, 222 B.R. 790, 792 (Bankr. N.D. Miss. 1998) ("In the opinion of the court, the dismissal and refiling were done purposeley [*sic*] to circumvent the effect of the two year limitations period."); *In re Miller*, 199 B.R. 631, 634 (Bankr. S.D. Tex. 1996) ("[I]t appears that the Second Bankruptcy was filed to thwart the IRS' notice of intent to levy; and consequently to shield themselves from any meaningful attempt to address their 1986 tax liability via the protection of the automatic stay."); *In re Clark*, 184 B.R. 728, 732 (Bankr. N.D. Tex. 1995) ("While homestead foreclosure prevention motivated, to some extent, the filing of the four bankruptcies * * * it appears that such bankruptcies were likewise used to shield Debtors from any attempt to meaningfully address, in any bona fide manner whatsoever, their 1987-88 tax liability.").

status to tax claims based on the amount of time the government has had to enforce them.

Indeed, the manner in which Congress structured the relevant Code provisions gave Congress no reason to assume that separately tolling the lookback period was necessary. The lookback period is triggered only by the actual filing of a bankruptcy petition. The ripeness of tax claims is measured from the time of that petition's filing. In addition, the bankruptcy process that the petition commenced, whether under Chapter 7 or Chapter 13, would by its very terms require full satisfaction or preservation of all tax claims falling within the lookback period. Finally, the complementary tolling provisions in the Bankruptcy and Internal Revenue Codes were designed to preserve the three-year enforcement window for the government during the bankruptcy proceeding. It is only the unanticipated use of premature Chapter 13 dismissals, coupled with a follow-up second bankruptcy filing, that has created the current tax evasion problem.

The asserted gap in the tax-specific provisions of the Bankruptcy Code that petitioners seek to exploit thus is not a result of congressional oversight or avoidance of a problem that was either known or reasonably foreseeable to Congress at the time it passed the Code. Nor is it a product of deliberate congressional omission or of legislative neglect. It is the result of debtors' creativity in claiming loopholes in a statutory scheme that Congress labored to protect from such circumventions. There is a limit to how many contingencies Congress can be expected to anticipate and how many holes it may foresee the need to plug in advance in the laws it enacts. This Court accordingly has recognized that statutes must be construed in light of their overall structure, history, and purpose. See *Chickasaw Nation*

v. *United States*, No. 00-507, 2001 WL 1488017, at *5 (Nov. 27, 2001) (construing statute in light of its overall structure, purpose, and "common sense"); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (construing law in light of its "text, purpose, and overall structure").[7]

Indeed, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 586 (1983). Courts retain the authority to "fill[] a gap left by Congress' silence." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). See also, *e.g.*, *Chickasaw Nation*, 2001 WL 1488017, at *7 (reading statutory provision as surplusage rather than adopting an interpretation that "would conflict with the intent embodied in the statute Congress wrote"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 28-29 (1989) (noting that there are "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (disregarding a statute's "plain language

[7] See also *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction 'is a holistic endeavor'" that must take into account not just text, but also a statute's "structure[] and subject matter."); *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991) (question of statutory construction under Bankruptcy Code is "to be resolved by reference to the text, history, and purpose of the Bankruptcy Code") (internal quotation marks omitted); see also *Helvering* v. *Gregory*, 69 F.2d 809, 810-811 (2d Cir. 1934) (L. Hand, J.) ("[T]he meaning of a [statute] may be more than that of the separate words, as a melody is more than the notes."), aff'd, 293 U.S. 465 (1935).

command[]" where "that literal reading would compel an odd result"); *id.* at 527-528 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [the rule] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition * * * was indeed unthought of, and thus to justify a departure from the ordinary meaning").

Honda v. *Clark*, 386 U.S. 484 (1967), illustrates the principle. There the Court held that a time limit for filing claims under the Trading with the Enemy Act, which was modeled on the Bankruptcy Act (*id.* at 495-496), was subject to tolling. Even though the statutory text there, as here, was silent, the Court held that "the statutory scheme itself requires tolling the limitation period during the pendency of [related] litigation," *id.* at 500. The Court deemed it sufficient to adopt such a construction that tolling was "much more consistent with the overall congressional purpose" and was "nowhere eschewed by Congress." *Id.* at 501; see also *id.* at 498 (tolling comports with the "repeated and uncontested expressions of congressional intent to facilitate and expand the rights of American creditors having an interest in these assets").

A focus on legislative purpose is particularly appropriate when addressing taxpayer efforts to manipulate statutory terms to circumvent their tax obligations. In *Gregory* v. *Helvering*, 293 U.S. 465 (1935), a taxpayer created a sham corporation to avoid paying taxes on a stock distribution. This Court held that, although the transaction fell within the letter of the law, it was "in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization," and it therefore fell "outside the plain intent of the statute." *Id.* at 470; see also *Superintendent of Five Civilized*

Tribes v. *Commissioner*, 295 U.S. 418 (1935) (upholding taxation where congressional intent reasonably clear); *Choteau* v. *Burnet*, 283 U.S. 691 (1931) (same). Petitioners' manipulation of the Code likewise would frustrate Congress's intent to give the government a full three years to collect taxes and would impose an irrational operation on the statute by transforming it into a road map for tax-avoidance.

Further, what petitioners advocate, reduced to its essence, is a holding that, through omission, Congress enacted an implicit exemption from recent income taxes for individuals who play their procedural cards right in bankruptcy. This Court, however, recently "warn[ed] * * * against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation*, 2001 WL 2488017, at *7.

b. Petitioners' Interpretation Would Create Anomalies and Inconsistencies.

In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), this Court explained that courts may confine their construction of the Bankruptcy Code to the statutory text only "as long as the statutory scheme is coherent and consistent." *Id.* at 240. But the construction petitioners propose is neither coherent nor consistent with other Code provisions.

As an initial matter, there is no rational basis for concluding that Congress, after formulating a carefully balanced compromise of tax liabilities and legislating a number of provisions designed to effectuate that balance, simultaneously intended to permit ready circumvention of those tax liabilities through serial bankruptcy filings. The balance that Congress struck guaranteed federal, state, and local taxing authorities

three years to collect income taxes; petitioners' position would permit discharge of those taxes before the government has the benefit of those three years. Yet petitioners offer no rational basis for concluding that Congress intended to take away with one hand what it gave with the other.[8]

In addition, petitioners' construction would create untenable anomalies and inconsistencies within the Bankruptcy Code. First, under Section 1307 of the Bankruptcy Code, a debtor or the bankruptcy court may convert a case from a Chapter 13 proceeding to a Chapter 7 proceeding. 11 U.S.C. 1307(a) and (c). If the case is converted, however, the lookback period continues to be measured from the time of the filing of the original petition, rather than from the conversion date.[9] Petitioners offer no explanation for why taxes should remain nondischargeable when cases are formally converted, but suddenly be rendered dischargeable

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[8] Petitioners' argument (Br. 21-25) that the IRS can sometimes successfully collect taxes during an earlier bankruptcy proceeding proves the point. The proceedings to which petitioners refer are *completed* bankruptcies where the taxes are paid as required by Chapter 13 or given priority and protected from discharge under Chapter 7. This shows that the provisions Congress enacted, when carried to completion, work to preserve priority tax claims as Congress intended. When a Chapter 13 proceeding is dismissed before confirmation of a plan, as occurred here, however, all of the interim payments that the debtor made to the trustee (see Pet. Br. 22) are returned to the debtor. The government, as in this case, is unable to collect a penny on its debt.

[9] See *In re Eysenbach*, 170 B.R. 57 (Bankr. W.D.N.Y. 1994), rev'd on other grounds, 183 B.R. 365 (W.D.N.Y. 1995); *In re Cross*, 119 B.R. 652 (Bankr. W.D. Wis. 1990); *In re Bailey*, 111 B.R. 151 (Bankr. W.D. Tenn. 1988); see also 4 *Collier on Bankruptcy*, *supra*, ¶ 507.10[2][a], at 507-61; *id.* ¶ 523.07[2][a], at 523-529.

through the de facto conversion accomplished by dismissal and refiling.

Petitioners counter (Br. 13) that Section 523(b) of the Bankruptcy Code permits discharge of debts in a later bankruptcy that were "excepted from discharge" in an earlier proceeding. 11 U.S.C. 523(b). That provision, however, actually undercuts petitioners' argument. Section 523(b), by its terms, applies only when the earlier bankruptcy proceeding was prosecuted to a conclusion, resulting in an actual discharge. Once such a discharge occurs, the six-year time limits on filing second bankruptcy petitions are triggered. See 11 U.S.C. 727(a)(8) and (9). That intervening six years, of course, would far surpass the three years available to the Internal Revenue Service under the lookback provision and would render any lingering tax claims dischargeable. Rather than support petitioners' position, then, Section 523(b) demonstrates that Congress expected tax claims to be discharged through serial filings only where the government had been afforded ample time to pursue its tax claims free from the automatic stay in the intervening years.

Second, as petitioners note (Br. 16-17), the 240-day time limit on collection of taxes subject to an "offer in compromise" with the Internal Revenue Service is tolled during pendency of the offer in compromise.[10] Congress added that tolling provision in 1978 when it learned that taxpayers were using the offer in compromise process—just as petitioners are using serial bankruptcy filings here—to circumvent the three-year lookback period. "[S]omé taxpayers," the Senate Report explained in words that echo the problem here, "have submitted a formal offer in compromise, dragged out negotiations with the taxing authority until the tax liability would lose priority under the three-year priority period, * * * and then filed in bankruptcy before the governmental unit could take tax[] collection steps." S. Rep. No. 989, *supra*, at 70-71; see also S. Rep. No. 1106, *supra*, at 15 n.11.

[10] An "offer in compromise" is an administrative agreement between the taxpayer and the Service in which the Service agrees to collect less than the entire amount of taxes due because a taxpayer is unable to make full payment, and the taxpayer agrees to either the immediate payment of that compromised amount or to pay that amount over time.

Petitioners insist that Congress's inclusion of that tolling provision for taxes subject to an offer in compromise, and the absence of a parallel tolling provision in the three-year lookback provision, demonstrates an intended dichotomy between "which taxes are dischargeable and which are not" (Pet. Br. 17). But Congress already drew that line in 1966 based on the age of the taxes and the length of time available to the IRS to collect, not on the procedural posture of the bankruptcy proceedings. There is no rational basis for concluding, as petitioners posit, that Congress amended the Code in 1978 to subdivide those taxes into truly nondischargeable taxes (those subject to an offer in compromise) and nondischargeable taxes that could be readily circumvented through serial filings (those not subject to such an offer). Nor have petitioners identified any reason why Congress, after the 1978 amendment, would have wanted to perpetuate the tax liabilities of debtors who, prepetition, cooperate with the IRS in a good faith effort to meet their tax obligations through an offer in compromise, while rewarding those who undertake no such efforts with a procedural release from nondischargeability. Rather, Congress amended the Code in 1978 to shore up the various

statutory provisions preserving liability for ripe tax claims by barring the one tax avoidance scheme that was brought to its attention. S. Rep. No. 989, *supra*, at 71 ("This rule closes [that] loophole.").[11]

Third, petitioners' approach would create a disincentive for debtors to fulfill their obligations under Chapter 13. Following a holding by this Court that taxes can be readily discharged through the medium of serial filings and well-timed dismissals, debtors' counsel will likely advise their clients that completing the Chapter 13 process will perpetuate their tax liabilities, whereas an appropriately timed dismissal and refiling under Chapter 7 will absolve the debtor of tax liabilities. The proposed interpretation thus would reward those who attempt to evade their taxes, while financially penalizing those who see their Chapter 13 proceedings through to the end.

[11] Congress has attempted explicitly to remedy the problem presented in this case. A bill passed Congress last year that was "intended to strongly limit the practice of using bankruptcy filings and the automatic stay that arises under section 362 to abuse the bankruptcy process" and to codify the court decisions tolling the three-year lookback period. S. Conf. Rep., 146 Cong. Rec. S11,708 (daily ed. Dec. 7, 2000), *available at* 2000 WL 1796598 (section-by-section explanation of H.R. 2415). That bill, which also contained a variety of controversial, unrelated provisions, was pocket-vetoed. As we advised the Court in our brief at the petition stage, the House and Senate have passed bills again this year that would codify the rule that the three-year lookback period is tolled for the period of an automatic stay entered in a prior bankruptcy proceeding. See H.R. 333, 107th Cong., 1st Sess. § 705 (2001); S. 420, 107th Cong., 1st Sess. § 705 (2001). The House and Senate appointed conferees to resolve the differences between the competing bankruptcy reform bills, none of which pertain to the tolling issue. The conferees were originally scheduled to meet on September 12, 2001, but that meeting was postponed due to the events of September 11th. On November 7, 2001, the conferees held their first meeting. We will continue to advise the Court of any legislative developments pertinent to this case.

Nor can petitioners substantiate their contention (Br. 13-16) that Congress intended the result they advance. That is because their analysis tells only half of the legislative story. Petitioners' argument focuses entirely on the debtor's interest in a fresh start and the general interests of other creditors. See *ibid.* But the entire purpose of the 1966 tax compromise was to strike a *three-way* balance between the interests petitioners identify and the preservation of federal and state tax claims, based on their recency and the government's opportunity for enforcement. See S. Rep. No. 1106, *supra*. at 5; S. Rep. No. 989, *supra*, at 13-15; *Tax Aspects of S. 2266*, *supra*, at 2-3. Because petitioners' argument ignores one of the most pressing concerns underlying the relevant statutory provisions, it lacks any solid grounding in congressional intent.

In short, relying solely on the absence of particular language in the statutory text, petitioners have exploited a perceived lacuna in the Bankruptcy Code. Allowing that asserted discontinuity to begin and end the construction of the statute, however, would be inconsistent with the overall structure of the Bankruptcy Code, would conflict with "other section[s] of the Code," would be "in clear conflict with state or federal laws of great importance," and is belied by the legislative history. *Ron Pair*, 489 U.S. at 243, 245; see also *id.* at 249 (O'Connor, J., concurring) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.") (quoting *United States* v. *Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting)). Further, petitioners' argument forgets that the canons of statutory construction on which they rely "are not mandatory

rules" and "need not be conclusive." *Chickasaw Nation*, 2001 WL 1488017, at *7. Rather, they are "designed to help judges determine the Legislature's intent"; "other circumstances evidencing congressional intent can overcome their force." *Ibid.* In this case, the statutory structure, reasonable operation of the statute as a whole, congressional intent, and the legislative history unite to defeat petitioners' focus on a congressional failure to anticipate a blatant manipulation of statutory language.

B. Traditional Principles Of Equitable Tolling Prevent The Running Of The Three-Year Lookback Period

1. Equitable Tolling is Appropriate Because of the Nature of the Lookback Period, the Legal Prohibition on Governmental Enforcement, Congressional Purpose, and the Public Interest.

Bankruptcy courts are courts of equity and, as such, may exercise general equitable powers in a manner consistent with the Bankruptcy Code.[12] Congress, moreover, expressly granted bankruptcy courts the broad power to issue "any order * * * that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105(a). In *Johnson* v. *Home State*

[12] See *United States* v. *Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990) (noting the "traditional understanding that bankruptcy courts [are] * * * courts of equity"); *Katchen* v. *Landy*, 382 U.S. 323, 336 (1966) ("[T]he proceedings of bankruptcy courts are inherently proceedings in equity."); *Pepper* v. *Litton*, 308 U.S. 295, 305 (1939) (bankruptcy courts' equitable powers "have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done").

Bank, *supra*, this Court indicated that the "broad equitable power" accorded bankruptcy courts by Section 105(a) empowers them to combat abuses that arise from serial bankruptcy filings. 501 U.S. at 88. That role is consistent with the historical understanding that, "[i]n the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate." *Pepper* v. *Litton*, 308 U.S. 295, 307-308 (1939).[13]

One of the most familiar components of equity jurisprudence is the doctrine of equitable tolling. Courts have long recognized that, "[w]here the plaintiff is prevented from filing timely suit by force of law, it is manifestly unjust to penalize him by barring the suit," and courts accordingly "have consistently implied a suspension of the limitations statute for the period of prohibition." *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1233 (1950). Indeed, this Court has held that time limits in federal statutes for filing claims are presumptively subject to equitable tolling. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'"); *Hallstrom*, 493 U.S. at 27; *Locke*, 471 U.S. at 94 n.10 ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling."). So venerable

[13] See also 2 *Collier on Bankruptcy*, *supra*, ¶ 105.01[2], at 105-8.1 ("The equitable origins of the bankruptcy power suggest substantial leeway to tailor solutions to meet the diverse problems facing bankruptcy courts. Section 105 gives the bankruptcy court the power to fill in gaps and further the statutory mandates of Congress in an efficient manner.").

is the practice that even waivers of sovereign immunity are presumed to incorporate the practice. *Irwin*, 498 U.S. at 95. That is because the assumption that Congress intended equitable tolling to be available in a statute "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation" of statutes. *Ibid.*; see also *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. * * * The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.").[14]

Finally, the equitable tolling doctrine can appropriately be applied to the three-year lookback period even if the Court concludes that the statute, standing alone, does not require tolling. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 336-337 & n.21 (1978); see also *id.* at 338 (Burger, C.J., concurring).

[14] Petitioners contend (Br. 28) that the availability of equitable tolling under Section 105(a) is not properly before the Court because the lower courts did not rely on that Section of the Code. The government, however, presented the argument to the bankruptcy court, and repeated that argument to the court of appeals. See Mem. of Law in Supp. of the United States' Mot. for Summ. J. 11-13; Gov't C.A. Br. 31-37. We also discussed the argument in our brief at the petition stage before this Court. See Gov't Br. 2, 13-14. Furthermore, the petitioners, in their certiorari petition, and the government, in its acquiescence, both broadly framed the issue presented in this case as whether tolling of the three-year lookback period was appropriate, without excluding consideration of any particular statutory provision or other source of authority.

a. The lookback period is the type of time limit that is subject to equitable tolling.

The lookback period is the type of time requirement that courts traditionally have found to be subject to equitable tolling. Indeed, in many respects, it is the functional equivalent, in the unique context of bankruptcy proceedings, of a statute of limitations or a "[s]tatutory filing deadline[]" (*Locke*, 471 U.S. at 94 n.10). First, the lookback period "prevent[s] the pressing of 'stale' claims," which is "the end served by a statute of limitations." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Second, the lookback period is measured from the due date of the legal obligation to file the tax return. See *Hallstrom*, 493 U.S. at 27 (statutes of limitations are generally "triggered by the violation giving rise to the action"). Furthermore, Congress discussed the lookback period as tantamount to a limitations period for collecting the unpaid tax. See, *e.g.*, H.R. Rep. No. 595, *supra*, at 190 ("The Bankruptcy Act gives the taxing authority three years to pursue delinquent debtors and obtain secured status."). Third, by authorizing discharge of stale claims, the lookback period forecloses such claims virtually as completely as a time bar on filing suit. Fourth, nothing in the lookback period's phraseology or structure suggests that Congress intended to foreclose tolling.[15]

[15] "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998). See also *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (equitable tolling not available where unique language and design of statutory provision was designed to foreclose it).

The lookback period is thus comparable to the other types of nontraditional time limits, both within and outside bankruptcy, to which equitable tolling has been applied. See, *e.g.*, *Irwin*, 498 U.S. at 92, 95 (equitable tolling applied to requirement that Title VII suit be filed within 30 days of receipt of notice of final action by the Equal Employment Opportunity Commission); *Zipes*, 455 U.S. at 393 (timely filing of a Title VII claim with the Equal Employment Opportunity Commission is a "requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Honda*, 386 U.S. at 494-500 (time limit for filing claims under the Trading with the Enemy Act, which was modeled on the Bankruptcy Act, is subject to equitable tolling); cf. *Nassau Smelting & Refining Works, Ltd.* v. *Brightwood Bronze Foundry Co.*, 265 U.S. 269, 273 (1924) (failure of creditor to prove claim within one-year statutory period does not preclude its participation in a composition plan).

Moreover, construing the lookback period as the type of statutory time limit traditionally subject to equitable tolling comports with the general principle that time limits "sought to be applied to bar rights of the Government[] must receive a strict construction in favor of the Government." *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984); see also *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 195 (1856) ("Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the Government of a power which * * * would enable individuals to embarrass it, in the discharge of the high duties it owes to the community—unless plain and express words indicated that such was the intention of the Legislature."). That is particularly true when the time limit "bar[s] the collection of taxes otherwise due and unpaid." *Badaracco*, 464 U.S. at 392 (internal quotation marks omitted).

Petitioners counter (Br. 17) that the three-year period substantively defines which taxes are dischargeable. They are mistaken. For the federal government, the source of the substantive right to collect the taxes is the Internal Revenue Code. See generally 26 U.S.C. 6301-6344 (1994 & Supp. V 1999). When Congress adopted the three-year lookback period in the Bankruptcy Code, it did so not to alter the government's substantive right to the taxes (whether within or outside bankruptcy). Rather, it enacted the lookback period to establish a time frame that would "adequately safeguard[] the public's interest in the collection of revenues" within the bankruptcy context. H.R. Rep. No. 687, *supra*, at 4. See also S. Rep. No. 989, *supra*, at 31 (lookback period gives government "adequate time to collect nondischargeable taxes"); H.R. Rep. No. 595, *supra*, at 190 (the three-year lookback "gives the taxing authority three years to pursue delinquent debtors"). Indeed, a House Report emphasized that "[t]he priority should apply if assessment or collection is stayed" because "the taxing authority has not had an adequate opportunity to assess or collect the taxes." H.R. Rep. No. 595, *supra*, at 191. Congress, in fact, chose the three-year "time limit" because it "coincides with the 3-year statute of limitations for assessments in Federal income tax cases." H.R. Rep. No. 687, *supra*, at 2.

Even if the time limit were deemed to be "substantive," courts have often applied equitable tolling to such time limits in the narrow circumstances where an official prohibition or analogous event beyond the party's control—such as the automatic stay—prevents pursuit of the claim. "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but

whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 557-558 (1974).[16] As discussed earlier, tolling of the lookback period is wholly "consonant with the legislative scheme." *Ibid.*

Thus, the three-year lookback period (i) is phrased like a time limit on collection through the medium of bankruptcy proceedings, because "[t]he sole function of assigning priority to certain tax claims is to enhance the government's ability to collect those claims" (*In re West*, 5 F.3d 423, 426 n.7 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994)), (ii) operates like a time limit in practice since "collectibility is obviously useless if the tax debt has been discharged" (*In re Brickley*, 70 B.R. 113, 115 (BAP 9th Cir. 1986)), and (iii) is expressly modeled on another statute of limitations. The lookback time period thus sounds in terms that are traditionally subject to equitable tolling. See *Pepper*, 308 U.S. at 305 n.11 (equitable tolling of time limit on when claims can be proved against the bankrupt estate).

b. Debtors cannot claim a lack of diligence on the part of the government.

Equitable tolling is appropriate "in situations where the claimant has actively pursued his judicial remedies." *Irwin*, 498 U.S. at 96. For purposes of the statutory provisions at issue here, Congress itself has defined, through the three-year lookback period, the appropriate time frame within which the government can reasonably be expected to enforce its tax claims in bankruptcy. All cases in which equitable tolling of the

[16] See also *McCormick* v. *United States*, 680 F.2d 345, 349 (5th Cir. 1980); *Whittaker* v. *Whittaker Corp.*, 639 F.2d 516, 527-528 (9th Cir.), cert. denied, 454 U.S. 1031 (1981); *Statutes of Limitations*, *supra*, 63 Harv. L. Rev. at 1235 & n.478.

lookback period is sought will, by definition, involve claims for which the government has been denied the lookback period's three years. During the pendency of earlier bankruptcy proceedings, it would be the operation of the automatic stay, rather than any foot dragging on the part of the government, that would prevent timely enforcement of the tax claim. In short, serial bankruptcy filings present prototypical circumstances for the application of equitable tolling, because the government "has not slept on [its] rights, but, rather, has been prevented from asserting them." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 429 (1965).

c. Congressional purpose and public policy support tolling.

Equitable tolling is wholly consonant with congressional intent. See *Burnett*, 380 U.S. at 427 ("[T]he basic inquiry" in determining whether equitable tolling is available "is whether congressional purpose is effectuated by tolling."). Congress's desire to preserve ripe tax claims and to ensure either their satisfaction within bankruptcy or their preservation through bankruptcy emanates from every corner of the Bankruptcy Code. Equitable tolling would likewise advance the strong public policy interest in protecting the government's claim to taxes and ensuring that all citizens bear their fair share of the tax burden.

Petitioners' reliance on *United States* v. *Noland*, 517 U.S. 535 (1996), is thus misplaced. In *Noland*, this Court held that bankruptcy courts may not employ equitable subordination to reorder the payment priorities established by Congress in the Bankruptcy Code. *Id.* at 540-541. The Court explained that, to subordinate the tax penalty, would "run[] directly counter to

Congress's policy judgment that a postpetition tax penalty should receive the priority of an administrative expense." *Id.* at 541. The application of equitable tolling to the lookback period, by contrast, fully implements congressional intent and preserves the payment priority and nondischargeability status that Congress afforded ripe tax claims.

2. A Uniform Rule of Tolling Should Be Adopted.

Equitable tolling should apply uniformly in all cases where the automatic stay entered in a debtor's earlier bankruptcy proceeding denied the government its full three years to pursue the tax claim. This Court has found adoption of such uniform tolling rules to be appropriate where their application is "fair to both plaintiff and defendant, carries out the purposes of the [statute], and best serves the policies of uniformity and certainty underlying the federal limitation provision." *Burnett*, 380 U.S. at 435-436; see also *Bowen* v. *City of New York*, 476 U.S. 467, 479-480 (1986) (adopting class-wide rule of equitable tolling).

This is such a case. As the Tenth Circuit observed in *In re Richards*, 994 F.2d 763 (1993), the relevant equitable considerations tilt so strongly in favor of the government that a universal rule of equitable tolling, rather than case-by-case application, is appropriate. *Id.* at 764.[17] Because equitable tolling would give the government only the amount of enforcement time that Congress promised it in the Bankruptcy Code, cases are unlikely to arise where the government will not have been sufficiently diligent to merit tolling.

[17] The Eleventh Circuit also appears to apply a presumption that tolling is appropriate if the debtor's earlier bankruptcy case prevented the government from collecting taxes during the three-year lookback period. See *Morgan*, 182 F.3d at 780.

Furthermore, tolling does not afford the government any time beyond what Congress prescribed to enforce the tax claim, so it is not unfair to debtors. Nor will the congressional purpose or public interest calculation change demonstrably from case to case. In addition, adopting a case-by-case approach to tolling would tend to encourage serial bankruptcy filings by debtors in the hope that a bankruptcy court ultimately will find, for whatever reason, that the equities favor discharge of their claim. See *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997) ("Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.").

The Sixth Circuit considered case-by-case tolling to be appropriate because it thought that the bad faith or manipulative intent of the debtor was determinative. See *In re Palmer*, 219 F.3d 580, 587 (6th Cir. 2000). Courts within the Fifth Circuit similarly seem to permit tolling only when the debtor has acted in a calculated manner in dismissing and re-filing bankruptcy cases or when the debtors have taken action to shield themselves from any meaningful attempt to address their tax liability via the protection of the automatic stay. See, *e.g.*, *In re Hollowell*, 222 B.R. 790 (Bankr. N.D. Miss. 1998); *In re Miller*, 199 B.R. 631 (Bankr. S.D. Tex. 1996); *In re Clark*, 184 B.R. 728 (Bankr. N.D. Tex. 1995). In so holding, however, those courts have confused the doctrines of equitable estoppel and equitable tolling. The former requires as a predicate bad faith or obstructive conduct on the part of the litigation target. See *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent."), cited with approval in *Brockamp*, 519 U.S. at 349. Equitable tolling, by

contrast, turns upon the claimant's exercise of due diligence and the disruption occasioned by events beyond the party's control. *Ibid.*[18]

In sum, because the government's tax collection efforts were thwarted by the petitioners' serial bankruptcy filings, the government has not yet had the three years Congress afforded it for such efforts. Furthermore, no equitable or public policy interests are advanced by rewarding the serial filing of uncompleted bankruptcies. This Court therefore should hold that the three-year lookback period is tolled during earlier bankruptcies.

[18] Petitioners repeat the Sixth Circuit's error when they suggest (Br. 28) that equitable tolling is unnecessary because the government can seek to dismiss "bad faith" bankruptcy filings through the rules governing contested matters. See Fed. R. Bankr. P. 9014. In any event, the lengthy and elaborate proceedings that surround such contests make them a clumsy vehicle for expeditiously reviving the government's ability to pursue or preserve tax claims. See *In re Gier*, 986 F.2d 1326, 1328 (10th Cir. 1993) (identifying eleven "nonexhaustive" factors to be considered in deciding whether to dismiss for bad faith). Furthermore, some courts have indicated that a dismissal solely for "bad faith" is not available under Chapter 7. See *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994) (dismissal must be "for cause"); *In re Padilla*, 222 F.3d 1194, 1192 (9th Cir. 2000) (same). The ability of the government to have abusive serial filings dismissed is thus far less certain than petitioners suggest.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The following is a non-exhaustive list of cases in which the federal government has litigated the tolling issue presented in this case:

Brustman v. *United States*, 99-1 USTC ¶50,348 (BAP 9th Cir. 1998);

In re Gurney, 192 B.R. 529 (BAP 9th Cir. 1996);

In re Brickley, 70 B.R. 113 (BAP 9th Cir. 1986);

In re Savini, 260 B.R. 689 (D.N.J. 2001);

United States v. *Messer*, No. 00 CIV. 2553 DLC 2000 WL 991337 (S.D.N.Y. July 19, 2000);

In re Offshore Diving & Salvaging, Inc., 242 B.R. 987 (Bankr. E.D. La.), aff'd, 99-2 USTC ¶ 50,994 (E.D. La. 1999);

In re Saunders, 240 B.R. 636 (S.D. Fla. 1999);

United States v. *Gilmore*, 226 B.R. 567 (E.D. Tex. 1998);

In re Pastula, 227 B.R. 794 (E.D. Mich. 1997);

In re Brent, 212 B.R. 311 (C.D. Ill. 1997);

Bosarge v. *United States*, 96-2 USTC ¶50,566 (S.D. Ala. 1996);

In re Ramos, 208 B.R. 655 (W.D. Tex. 1996);

In re Miller, 199 B.R. 631 (S.D. Tex. 1996);

Acosta v. *IRS*, 184 B.R. 544 (W.D. Tenn. 1995);

In re Eysenbach, 183 B.R. 365 (W.D.N.Y. 1995);

Solito v. *United States*, 172 B.R. 837 (W.D. La. 1994);

In re Grogan, 158 B.R. 193 (E.D. Calif. 1993), aff'd 168 B.R. 382 (BAP 9th Cir. 1994);

In re Linder, 139 B.R. 950 (D. Colo. 1992);

In re Deitz, 116 B.R. 792 (D. Colo. 1990);

In re Molina, 99 B.R. 792 (S.D. Ohio 1988);

In re Pattalochi, 269 B.R. 60 (Bankr. D. Wyo. 2001);

In re Fiels, 260 B.R. 362 (Bankr. D. Md. 2001);

In re Hoppe, 259 B.R. 852 (Bankr. E.D. Tex. 2001);

In re Evoli, 258 B.R. 839 (Bankr. M.D. Fla. 2001);

In re Schultz, 86 A.F.T.R.2d ¶ 5027 (Bankr. D.N.H. 2000);

In re Hamrick, 259 B.R. 224 (Bankr. M.D. Ga. 2000);

In re Morgan, 255 B.R. 247 (Bankr. N.D. Ga. 2000);

In re Kaiser, 242 B.R. 643 (Bankr. N.D. Ohio 1999);

In re Bair, 240 B.R. 247 (Bankr. W.D. Tex. 1999);

In re Barton, 236 B.R. 613 (Bankr. W.D. Va. 1999)

In re Burt, 237 B.R. 914 (Bankr. N.D. Miss. 1999);

In re Avila, 228 B.R. 63 (Bankr. D. Mass. 1999);

In re Tarullo, 85 AFTR2d ¶2000-459 (Bankr. N.D.N.Y. 1999);

In re Kelly, 99-2 USTC ¶51,002 (Bankr. C.D. Cal. 1999);

In re Thompson, 99-2 USTC ¶51,007 (Bankr. N.D. Ga. 1999);

In re Seawright, 1999 WL 1495417 (Bankr. D.N.J. 1999);

In re Tarullo, No. 97-12412, 1999 WL 1424988 (Bankr. N.D.N.Y. 1999);

In re Seawright, 1999 WL 1495417 (Bankr. D.N.J. 1999);

In re Fontes, 228 B.R. 3 (Bankr. N.D. Ala. 1998);

In re Daniel, 227 B.R. 675 (Bankr. N.D. Ind. 1998);

In re Hollowell, 222 B.R. 790 (Bankr. N.D. Miss. 1998);

In re Thomas, 222 B.R. 742 (Bankr. E.D. Pa. 1998);

In re Blakely, 219 B.R. 722 (Bankr. S.D. Miss. 1998);

In re Collins, 223 B.R. 372 (Bankr. M.D. Fla. 1997);

In re Little, 216 B.R. 769 (Bankr. E.D.N.C. 1997);

In re Zecco, 211 B.R. 109 (Bankr. D. Mass. 1997);

In re Rangel, 209 B.R. 744 (Bankr. D. Colo. 1997);

In re McMillan, 204 B.R. 835 (Bankr. M.D. Ga. 1996);

United States v. *Colvin*, 203 B.R. 930 (Bankr. N.D. Tex. 1996);

In re Darden, 202 B.R. 715 (Bankr. E.D. Va. 1996);

In re Cowart, 199 B.R. 799 (Bankr. M.D. Fla. 1996);

In re Strickland, 194 B.R. 888 (Bankr. D. Idaho 1996);

In re Macko, 193 B.R. 72 (Bankr. M.D. Fla. 1996);

In re Dodson, 191 B.R. 869 (Bankr. D. Or. 1996);

In re Shedd, 190 B.R. 692 (Bankr. M.D. Fla. 1996);

In re Tibaldo, 187 B.R. 673 (Bankr. C.D. Cal. 1995);

In re DiCamillo, 186 B.R. 59 (Bankr. E.D. Pa. 1995);

In re Clark, 184 B.R. 728 (Bankr. N.D. Tex. 1995);

In re Turner, 182 B.R. 317 (Bankr. N.D. Ala. 1995), opinion on reconsideration, 195 B.R. 476 (1996);

In re Gore, 182 B.R. 293 (Bankr. N.D. Ala. 1995);

In re Sirman, 171 B.R. 403 (Bankr. M.D. Fla. 1994);

In re Harris, 167 B.R. 680 (Bankr. M.D. Fla. 1994);

In re Teeslink, 165 B.R. 708 (Bankr. S.D. Ga. 1994);

In re Reed, 165 B.R. 959 (Bankr. N.D. Ga. 1993);

In re Bowling, 147 B.R. 383 (Bankr. E.D. Va. 1992);

In re Ringdahl, Bankr. L. Rep. (CCH) ¶74,082 (Bankr. M.D. Fla. 1991);

In re Ross, 130 B.R. 312 (Bankr. D. Neb. 1991);

In re Wise, 127 B.R. 20 (Bankr. E.D. Ark. 1991);

In re Stoll, 132 B.R. 782 (Bankr. N.D. Ga 1990);

In re Bryant, 120 B.R. 983 (Bankr. E.D. Ark. 1990);

In re Davidson, 120 B.R. 777 (Bankr. D.N.J. 1990);

In re Florence, 115 B.R. 109 (Bankr. S.D. Ohio 1990);

In re Quinlan, 107 B.R. 300 (Bankr. D. Colo. 1989);

In re Carter, 74 B.R. 613 (Bankr. E.D. Pa. 1987);